Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE VOLLRATH COMPANY,
Petitioner,

v.

SAMMI CORPORATION,
KEN CARTER INDUSTRIES, INC., and
SAMMISA (AMERICA) CORP.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 1 of The Sherman Antitrust Act prohibits combinations "in restraint of trade or commerce . . . with foreign nations."

The questions presented are:

1. Where a jury has found that an arrangement among Korean exporters to divide and allocate products to be exported to the United States violates Section 1 of the Sherman Act, may a federal court overturn that verdict on the ground that "American antitrust laws do not regulate the competitive conditions of other nations' economies"?

2. May a federal appeals court refuse to review the ruling of a trial court on the legality of a foreign market division arrangement, where the gist of the plaintiff's cause of action under Section 1 of the Sherman Act was obvious from the outset?

RULE 29.1 LISTING

Petitioner, The Vollrath Company, has been merged into Windway Capital Corp.

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PETITION FOR WRIT OF CERTIORARI

The Vollrath Company respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, pp. 1a-17a) is reported at 9 F.3d 1455 (9th Cir. 1993). The opinion of the District Court (Appendix B, pp. 18a-60a) is reported at 1990 CCH Antitrust Trade Reg. Rep., Para. 68,955.

JURISDICTION

The Court of Appeals entered its judgment on November 29, 1993 and denied a timely petition for rehear-

ing on January 13, 1994. (Appendix C, p. 61a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of The Sherman Antitrust Act, 15 U.S.C. § 1, provides, in relevant part, that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . with foreign nations is declared to be illegal." The full text of the statute is Appendix F, p. 76a.

STATEMENT

The Vollrath Company ("Vollrath"), a Wisconsin corporation, brought an action in the Federal District Court for the Central District of California against Sammi Corp. ("Sammi"), a Korean corporation. The jurisdiction of the district court was invoked under 15 U.S.C. §§ 15 and 26 and 28 U.S.C. § 1337. Vollrath claimed, *inter alia*, that a market division arrangement among an association of Korean exporters, which restricted exports of stainless steel products to the United States, violated Section 1 of the Sherman Act. A jury verdict in favor of Vollrath was overturned by the district court with a judgment notwithstanding the verdict. On appeal, the court of appeals refused to consider the market division issue, stating that the issue was not presented to the district court.

A. A Summary Reconsideration Order Is All That Is Required To Dispose Of This Petition

THIS CASE DOES NOT REQUIRE PLENARY CONSIDERATION AT THIS TIME. The immediate lower court ruling at issue is a refusal by the United States Court of Appeals for the Ninth Circuit to consider the merits of Vollrath's claim that the market division arrangement violated Section 1 of the Sherman Act (Question No. 2).

The district court overturned a jury verdict in Vollrath's favor, issuing a judgment notwithstanding the ver-

dict ("JNOV"). With respect to Vollrath's claim that the market division among Korean exporters was a violation of Section 1 of the Sherman Act, the district court stated that the alleged conduct "would certainly be anticompetitive in Korea. However, the 'American antitrust laws do not regulate the competitive conditions of other nations' economies,' *Matsushita*, 475 U.S. 582." (App. p. 23a, n.38)

Vollrath challenged this ruling on appeal, contending that market divisions—which are illegal *per se* under United States law—are not insulated from challenge under Section 1 of the Sherman Act when imposed by foreign companies exporting to the United States, rather than domestic suppliers.

The court of appeals declined to consider the issue, stating that the "theory was not presented in the district court." (App. 14a-15a, n.4.) The immediate issue raised by Question No. 2 is, simply, whether the court of appeals was correct in refusing to decide the issue.

If this Court agrees that the court of appeals should have considered the market division issue, this Court need only grant certiorari, vacate the judgment below, and remand the case to the appeals court with instructions to decide the issue. See, *e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 475, n.6 (1970):

> When attention has been focused on other issues or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court. See Aetna Cas. & Sur. Co. v. Flowers, 330 US 464, 468, 91 L Ed 1024, 1027, 67 S Ct 798; United States v. Ballard, 322 US 78, 88, 88 L Ed 1148, 1154, 64 S Ct 882.

If, however, this Court wishes to reach the merits of the market division issue (Question No. 1), it may do so even though the court of appeals has not decided the

issue. See, *e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568, 582, n.24 (1979):

> The failure of the Court of Appeals to address the statutory issue decided by the District Court does not, of course, prevent this Court from reaching the issue. Cf. University of California Regents v. Bakke, 438 US 265, 57 L Ed 2d 750, 98 S Ct 2733.

B. Facts Presented To The Jury Concerning The Market Division And Its Impact On Vollrath

1. *The Korean Market Division Arrangement*

The Korea Metal Flatware Exporters Association (the "export association") is a group of Korean companies which export a variety of metal products, including the stainless steel products which were at issue in this action. The stated goals of the export association include avoiding "overcompetition" on price and regulating product quality. (R.T. Vol. 11, p. 180, L-5 - p. 182, L.24 [testimony of K. Park, officer of Sammi].)

The export association operates a "design registration" system, under which the members of the association divide and allocate products available for export. A particular exporter can "register" a product with the association and thereby gain exclusive control over exports of that product. With such a "registration" in place, the individual exporter can regulate the supply of the registered product to the United States. No other Korean company can export that product to the United States without the permission of the registration holder. (R.T. Vol. 3PM, p. 43, L.11 - p. 44, L.12; Vol. 5, p. 156, L.25 - p. 157, L.11 and p. 182, L.4-19; Vol. 11, p. 147, L.12 - p. 148, L.16 and p. 158, L.10-13 [K.Park].)

The design registration system is a private business arrangement. The Korean government neither directs nor compels these companies to operate such a system. ([Declaration of H.S. Kim, Sammi official], Excerpts, Tab. 12; R.T. Vol. 3PM, p. 44, L.8-12; R.T. Vol. 6, p. 84, L.22 -

p. 85, L.18; R.T. Vol. 11, p. 88, L.16-23). The "registration," itself, sometimes called a "design patent," is not ancillary to any property right.

> "This 'patent' is not a property right akin to the patent normally obtained in the United States and indeed with the Korean government. . . . [I]t is not based at all on inventiveness, creativity or ingenuity. Indeed, the registration itself contains simply a photograph of the item . . . [and] says nothing about size, color, measurements or the like. It is merely an administrative priority for exporters only. Registration . . . does not give the Korean manufacturer or exporter any property rights or protection. . . . [I]t is not sanctioned or registered for any type of protection with the Korean government. It is administered by a self-regulating association with no governmental or legal powers." (Ex. 783 [Declaration of S.W. Kim, a Sammi official], para. 5.)

2. *The Impact Of The Market Division Arrangement On Vollrath*

The Consumer Products Division of Vollrath was engaged principally in importing stainless steel kitchenware products from Korea, for distribution through major retailers such as Montgomery Ward.

In early 1983, Vollrath began an intensive and urgent program to develop new stainless steel steamer models for its customers. Vollrath poured extensive effort into the development program, consulting with home economists and key customers. (R.T. Vol. 4AM, p. 29, L.4-21; Vol. 4AM, p. 81, L.2 - p. 82, L.2 and Vol. 4AM, p. 86, L.22 - p. 87, L.5.) Vollrath's major consumers—such as Montgomery Ward, Sears, Ace Hardware, Cotter, Macy's Jordan Marsh, Gimbels—were enthusiastic about the new steamers, which had a number of distinctive features that buyers desired. (R.T. Vol. 4AM, p. 29, L.22 - p. 31, L.7; Vol. 4-B, p. 19, L.5 - p. 20, L.15; Vol. 7, p. 27, L.

15 - p. 29, L.1; Vol. 4-B, p. 15, L.25 - p. 17, L.4 and p. 18, L.7-18.)

All of the eligible suppliers of stainless steel steamers were in Korea (R.T. Vol. 6, p. 19, L.1 - p. 20, L.7; Vol. 3PM, p. 42, L.13-19) and belonged to the export association. Vollrath interviewed potential Korean suppliers for the steamers, including Sammi. Vollrath rejected Sammi as a supplier because its prices were high and its quality was low. (R.T. Vol. 6, p. 36, L.19-p. 37, L.8.) Vollrath selected Dae Lim as its supplier, a manufacturer with whom it had done other business and whose quality and reliability Vollrath respected. (R.T. Vol. 5, p. 148, L.16-19; p. 160, L.11-15.)

During the summer of 1983, Vollrath supplied Dae Lim with designs, obtained samples, and then placed an order for $2.1 million worth of stainless steel steamers, with shipments to commence in October. (Ex.258 and R.T. Vol. 5, p. 149, L.10 - p. 150, L.13; p. 150, L.24 - p. 151, L.19; p. 159, L.10-13.) The timing of the shipments was critical to Vollrath. Several of its major customers, including its largest customer, Montgomery Ward, had committed to catalogue marketing programs for the steamers. (R.T. Vol. 4-B, p. 23, L.3- -p. 24, L.6; Vol. 7, p. 29, L.11-21.) These companies were required to have supplies in inventory at the time the catalogues went to press—in this case, approximately December 1, 1983. If Vollrath could not guarantee supplies at that point, Vollrath had an obligation to notify the customer and the items would have to be withdrawn from the catalogue. (R.T. Vol. 7, p. 32, L.23 - p. 33, L.24; Vol. 5, p. 22, L.10 - p. 23, L.5.) Because these major retailers operate on a six-month planning cycle in their catalogue programs, a delay in the initial product shipments beyond the deadline would have the practical effect of delaying the catalogue program by six months. (R.T. Vol. 7, p. 33, L.25 - p. 35, L.5; Vol. 2, p. 88, L.2-23.)

The timing of the shipments was also critical because of the approaching Christmas season—a major sales pe-

riod in which it was essential to have these steamers available for retail shelves—as Vollrath had promised other customers. (R.T. Vol. 2, p. 82, L.19-L.25; Vol. 4-B, p. 24, L.7 - p. 25, L.7.)

In the Fall of 1983, with the steamers in production at Dae Lim, Vollrath learned from Dae Lim that Sammi intended to block Dae Lim from shipping the steamers to Vollrath, having obtained control over the export of steamers through the design registration program of the export association. (R.T. Vol. 5, p. 156, L.25 - p. 157, L.23.) Dae Lim said it was working to try to change the situation, but could not guarantee that the shipments would be made. (R.T. Vol. 5, p. 174, L.6-22; Ex.407.) According to Dae Lim, "if Sammi didn't want to agree, they had the power of veto." (R.T. Vol. 5, p. 180, L.19-24.) Increasingly distressed as the problem continued, Vollrath sent a delegation to Korea to confront Sammi directly. In a meeting at Sammi's offices in Seoul on November 1, Vollrath threatened to take the problem to the Korean government if Sammi did not relent. (R.T. Vol. 5, p. 174, L.25 - p. 176, L.18.) At that meeting, Sammi promised to allow some shipments to proceed. (R.T. Vol. 5, p. 176, L.19 - p. 177, L.2.)

In fact, however, no shipments were released, and the blockage continued on through November and into December. (R.T. Vol. 5, p. 177, L.1-L.15.) By this point Vollrath, though contractually committed to its order (large portions of which Dae Lim had manufactured and packaged over the preceding four months), had to notify its catalogue and retail shelf customers that the steamers would not arrive in time. (R.T. Vol. 5, p. 22, L.22 - p. 23, L.5.) This was heavily damaging to Vollrath, both in terms of lost catalogue and Christmas business and in terms of its reputation as a reliable supplier. (R.T. Vol. 2, p. 88, L.16-23; Vol. 4-B, p. 33, L.13 - p. 35, L.8.) Montgomery Ward, in particular, became "leery" of future items that Vollrath might present to them, stating that to run a "promotion and not have the merchandise

in the stores is a cardinal sin." (R.T. Vol. 7, p. 34, L.6 - p. 35, L.5.)

Sammi did eventually allow Dae Lim to ship portions of the initial order, which triggered yet another major problem for Vollrath. Backed-up steamers, which Dae Lim had been producing during the Summer and Fall of 1983, and which Vollrath had expected to begin receiving in early October to meet the catalogue and Christmas deadlines, began to arrive too late. (R.T. Vol. 9, p. 28, L.4-13.) The major catalogue deadlines and Christmas season had passed (R.T. Vol. 4-B, p. 25, L.8-14), and Vollrath could not immediately dispose of the incoming steamer inventory. Vollrath was forced to incur extraordinary inventory costs, including the rental of an entire warehouse to house the backed-up steamers. (R.T. Vol. 9, p. 28, L.14 - p. 30, L.14.)

Meanwhile, Vollrath had begun to press for assurance that, if it continued with the steamer business in the coming seasons, future shipments would not be blocked by Sammi. Vollrath emphasized that it did not want a "one-shot" deal—it wanted to sell steamers for many years. (R.T. Vol. 6, p. 46, L.24 - p. 48, L.11; p. 50, L.16-25; Ex.405.) It could not obtain that assurance from either its buying agent or Dae Lim. (R.T. Vol. 5, p. 183, L.4-8; Ex.408, Ex.410.)

In February of 1984, a competitor of Vollrath's, Metro Industries, Inc. ("Metro"), was also attempting to import stainless steel steamers from a Korean supplier, and the shipments were being blocked by Sammi. Metro sent a representative to Korea to meet with Mr. Nam, the manager of Sammi's export department. Mr. Nam had a Vollrath steamer manufactured by Dae Lim at the meeting, and told the Metro representative that Sammi would not let Dae Lim ship the unit to the United States in the future. (R.T. Vol. 3PM, p. 54, L.1 - p. 59, L.4.)

Vollrath's encounter with the Korean design registration system came at a critical time for its consumer prod-

ucts division, which was weighing whether it could continue in a business which necessarily relied on imports of stainless steel products from Korea. The experience with the stainless steel steamers showed Vollrath that it could not choose its suppliers in Korea, because of the design registration system, and therefore could not control the price and quality of its products. This led Vollrath to close its consumer products division. (R.T. Vol. 2, p. 105, L.15 - p. 106, L.7 [testimony of T. Kohler, President of The Vollrath Company]; Vol. 9AM, p. 33, L.2-15.)

C. Instructions Given The Jury With Respect To The Market Division Arrangement

The stipulated set of instructions given to the jury included the following:

> "Any unreasonable interference . . . with the ordinary, usual and freely competitive pricing or distribution system of the open market . . . among the several states *or with foreign nations* constitutes an unreasonable restraint of interstate trade, and is a violation of the federal antitrust laws." (R.T. April 4, 1989, p. 25, L.6-12.) (emphasis added)

> "One indicator of an intent to restrain competition unreasonably is the *lack of legitimate business reasons* for an agreement or combination." (*Id.* at p. 34, L.9-11.) (emphasis added)

> "Certain arrangements are deemed by their nature and necessary effect to be plainly anticompetitive so that *no elaborate study of the industry is needed* to establish their illegality and they are considered illegal *per se*." (*Id.* at p. 31, L.6-9.) (emphasis added).

> "[I]n order for a plaintiff to prove an unlawful conspiracy, it must show either that the combination, contract, or conspiracy *included others than the defendants*, or that . . . ." (*Id.* at p. 20, L.12-15.) (emphasis added)

> "Before the jury may find that Sammi, Sammisa, and/or Ken Carter unlawfully combined together *with others*, a preponderance of the evidence must show that they knowingly participated in the combination with the intent to advance or further some object or purpose of the combination." (*Id.* at p. 29, L.10-15.) (emphasis added)

D. The District Court's Analysis Of The Market Division In The Opinion Supporting The JNOV

The district court's analysis of the Section 1 claim directed to the market division arrangement appears in Appendix A, pp. 46a-47a.

The analysis began with the following statement: "plaintiff claims that the operation of the Korean Metal Flatware Association itself violated the antitrust laws." (App. 46a, L.14-16.) With respect to whether the association has, as one of its purposes, the control of price competition, the district court stated that Vollrath is "[a]rguing from unsupported innuendo," distorting the testimony of Mr. Park, a Sammi official. (App. 46a, L.16-17 and n.36.)

The district court next asserted that there is "absolutely no evidentiary support" for Vollrath's claim that Sammi was able to "intimidate" Dae Lim into withholding steamer exports to Vollrath. (App. 47a, L.3-5.)

The district court then stated that "there is no explanation in the record" why a portion of the initial order was released. (App. 47a, n.37, L.8-9.)

[*These comments by the court were irrelevant: Vollrath's case does not depend on whether the export association openly acknowledged price fixing, whether Dae Lim felt "intimidated" by Sammi, or why Sammi relaxed its grip temporarily in 1984.*]

The district court then concluded that, since Sammi "offered to sell steamers to Vollrath," there was no harm to competition. (App. 47a, L.10-13.)

[*The court appears to suggest that market divisions are harmless so long as the company controlling the product is willing to take all of the business.*]

The district court then reached the heart of its ruling, stating that, if Dae Lim was prevented from exporting stainless steel steamers, "that conduct would certainly be anticompetitive in Korea. However, the 'American antitrust laws do not regulate the competitive conditions of other nations' economies,' *Matsushita*, 475 U.S. 582." (App. p. 28a).

E. The Court Of Appeals Decision

The court of appeals affirmed the district court's JNOV "essentially for the reasons expressed" in the district court's opinion. (App. 8a, third full paragraph, L.5-7.) In doing so, the court declined to consider the Section 1 charge directed to the market division, stating that the theory "was not presented to the district court." (App. 14a-15a, n.4.)

More specifically the court of appeals stated: "Vollrath also raises for the first time on appeal a contention that the restriction of output by Sammi was a 'naked restraint of trade' and a *per se* violation of Section 1 of the Sherman Act" (App. 8a, L.8-11) and (in another part of the opinion) "[o]n appeal, Vollrath seeks to expand the number of alleged conspirators to non-defendants, Dae Sung and the Korean Holloware Association." (App. 15a, L.15-17.)

REASONS FOR GRANTING THE PETITION

I. AS TO QUESTION NO. 1: WHETHER AN ARRANGEMENT AMONG FOREIGN COMPANIES TO DIVIDE AND ALLOCATE EXPORTS TO THE UNITED STATES IS PROTECTED FROM SECTION 1 CHALLENGE BECAUSE "THE AMERICAN ANTITRUST LAWS DO NOT REGULATE THE COMPETITIVE CONDITIONS OF OTHER NATIONS' ECONOMIES"

A. The Decision Below Conflicts With A Recent Decision Of This Court And The Issue Is Important

The court of appeals has affirmed and adopted the essential reasoning of the district court decision on the Section 1 claim directed to the Korean market division, i.e., that "American antitrust laws do not regulate the competitive conditions of other nations' economies." That reasoning conflicts with this Court's recent decision in *Hartford Fire Ins. Co. v. State of California* and *Merrett Underwriting Agency Mgmt. Ltd. v. State of California* [consolidated cases], 113 S. Ct. 2891, 2910 (1993), which states:

> "[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws," even where the foreign state has a strong policy to permit or encourage such conduct. Restatement (Third) Foreign Relations Law §415, Comment j; *see Continental Ore Co., supra,* at 706-707.

A discussion of the *Hartford* case is contained in Appendix E, pp. 72a-74a.

This is an important issue as the United States attempts to administer its antitrust laws in an increasingly fluid international context. When foreign companies exporting to the United States divide markets and restrict output, there is a direct effect on "United States Commerce," which includes the "import" commerce of the United

States. H.R. No. 97-637, Leg.Hist. P.L. 97-290, 1982 U.S. Code Cong. and Admin. News, 2431, at 2494-2497. "[I]t is important that there be *no misunderstanding* that import restraints, which can be damaging to American consumers, remain covered by the law." (*Id.* at 2494.) (emphasis added)

B. The Decision Below Is Erroneous And Conflicts With Longstanding Fundamental Antitrust Principles

The oldest and clearest antitrust principle is that "naked" restrictions on competition (i.e., eliminations of market rivalry which are not ancillary to the creation of economic efficiency) are inherently damaging to consumer welfare and are therefore deemed *per se* illegal under Section 1 of the Sherman Act. The economic basis for this clear judgment is that such restrictions lead inexorably to control over prices and narrowed consumer choice. The roots of this basic principle are contained in the legislative history of the Sherman Act and in the seminal decisions of this Court interpreting the act.

See, e.g., 21 Cong. Rec. 2456 (1890), where Senator Sherman, recognizing the inexorable connection between "naked" restraints and higher prices, called on the courts to "distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition . . ."; *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897) and *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898), where Justice Peckham framed the *per se* rule against elimination of rivalry with no efficient economic integration (in those two cases, the rivalry eliminated was price); *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), where Judge Taft applied the *per se* standard against "naked" restraints and distinguished them from "ancillary" restraints, which are subordinate to separate business transactions (in that case, the "naked" restraints were price-fixing and market division); and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), where Justice White placed market division agreements in a *per*

se category because of their "inherent nature" and distinguished them from "rule of reason" practices (where efficiencies may exist), which require an investigation of the purpose and effect of the practice to determine legality.

Later decisions of this Court during the 1950's-1970's which flesh out the basic principle in the context of market division arrangements and customer allocations among competitors include: *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) (allocation of trade territories internationally, restricting imports into and exports from the United States, *per se* illegal, part of aggregation of restraints including price control); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (market division *per se* illegal, part of aggregation of restraints); and *United States v. Topco Associates*, 405 U.S. 596 (1972) (both market divisions and customer allocations, unaccompanied by other restraints, *per se* illegal).

More recently, this Court has turned its attention specifically to "naked" restrictions of the type involved here, in *NCAA v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 109-110 (1984):

> "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.' [citation] . . . [T]he plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference. [citations] We have never required proof of market power in such a case. [citations] This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."

Then, in *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 460-461 (1986) this Court elaborated further:

> [*after quoting NCAA on the point that a "naked restraint does not require market analysis*]

> "Moreover, even if the restriction imposed by the Federation is not sufficiently 'naked' to call this principle into play, the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason. . . . Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output' can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects. 7 P. Areeda, *Antitrust Law* ¶ 1511, p. 429 (1986)."

In the case which is the subject of this petition, an association of companies in Korea entered into an agreed elimination of rivalry by giving Sammi exclusive control over the export of stainless steel steamers—a market division agreement. This agreement was not ancillary to any separate business purpose nor did it involve the creation of any economic integration or efficiency. This was a "naked" restriction. Having obtained control over steamer exports through that market division, Sammi then used that power to effect a direct output restriction: blocking Dae Lim from supplying Vollrath's products, causing "actual detrimental effects." This is precisely the evil to which the Sherman Act's *per se* rules are directed.

II. AS TO QUESTION NO. 2: WHETHER AN APPEALS COURT MAY REFUSE TO REVIEW THE RULING OF A TRIAL COURT ON THE LEGALITY OF A FOREIGN MARKET DIVISION ARRANGEMENT, WHERE THE GIST OF THE PLAINTIFF'S CAUSE OF ACTION UNDER SECTION 1 OF THE SHERMAN ACT WAS OBVIOUS FROM THE OUTSET

A. The Decision Below Is In Direct Conflict With A Decision Of This Court And The Issue Is Important

The court of appeals' refusal to consider the Section 1 charge directed to the market division arrangement on the ground that the particular theory of conspiracy was not

presented in the district court conflicts directly with this Court's decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968).

In *Perma Life,* the plaintiff in a Sherman Act, Section 1 case did exactly what Vollrath is accused of doing here: it focused on the non-defendant co-conspirators (i.e., itself and other franchisees of Midas) for the first time on appeal. And, as Sammi did here, the respondents in the *Perma Life* case argued that those "particular theories" of conspiracy were not articulated in the complaint. This Court responded in this way:

> Although respondents object that these particular theories of conspiracy now pressed by petitioners were not alleged with sufficient specificity in their complaint, this suggestion is completely without merit. Our modern rules provide for trying cases to serve the ends of justice and require that pleadings "be so construed as to do substantial justice." Rule 8(f), Fed. Rules Civ. Proc. The gist of petitioners' cause of action has been clear from the outset, and respondents will in no way be prejudiced if petitioners are permitted to rely on these alternative theories of conspiracy.

The "gist" of Vollrath's case has also been clear from the outset, which is apparent when one reviews the extensive record on the market division, the jury instructions, and the district court's comments and rulings in the opinion supporting the JNOV.

Rule 8(f) Fed. Rules Civ. Proc. embodies one of the most important principles in modern trial practice—that cases are to be tried on their real merits, to serve the ends of justice. This Court should not allow that principle to be eroded by a decision that avoids the merits, particularly where important international antitrust issues are involved.

B. The Court Of Appeals' Conclusion That The Issue Was Not Presented To The District Court Is Erroneous And Conflicts With Basic Standards For Determining Whether Issues Have Been Raised

In *E.R. Fegert, Inc. v. Seaboard Surety Co.*, 887 F.2d 955, 957, this same court of appeals concluded that:

> "[a] workable standard [for determining whether an issue was raised below] is that the argument must be raised sufficiently for the trial court to rule on it. *See Inland Cities Express, Inc. v. Diamond Nat'l Corp.*, 524 F.2d 758, 755 (9th Cir. 1975).

In this case, there is no question that the standard was met. Both parties devoted substantial amounts of time in discovery and trial to fleshing out the relationships among Sammi, Dae Lim, and the export association. Vollrath introduced Exhibit 783, the Kim declaration, and the testimony of several other witnesses to show that the market division was not ancillary to any legitimate business purpose. Sammi tried several times to create the impression that the market division was a "governmental" function and that Sammi's control over exports was a "patent" right. Both sides discussed whether the association acknowledged price fixing as one of its goals. The district court commented on all of these issues in the JNOV opinion.

The district court focused directly on the issue in the jury instructions, with express instructions on "non-defendant" co-conspirators and *per se* theory. Finally, in the JNOV opinion, the district court stated "plaintiff claims that the operation of the Korean Metal Flatware Association itself violated the antitrust laws" but then concluded that the market division was not actionable because "American antitrust laws do not regulate the competitive conditions of other nations' economies."

C. Vollrath Was Not Required To Plead *Per Se* And "Rule Of Reason" Theories Separately

As part of its rationale for concluding that Vollrath had not raised the market division issue in the district court, the court of appeals emphasized that the terms *per se* and "naked" restraint were employed for the first time on appeal (App. 8a, L.8-11). In doing this, the appeals court overlooked the fact that, in modern antitrust analysis, "the rule of reason and the per se rule are 'converging,' and that often there is 'no bright line' separating one mode of analysis from another." Phillip E. Areeda, *Antitrust Law*, 1993 Supplement, ¶ 1511. Areeda demonstrates with an example from a 1989 Federal Trade Commission case, where the Commission explained its reasoning process as follows:

> First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and reduce output"? *For example, horizontal price-fixing and market division are inherently suspect because they are likely to raise price by reducing output.* If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (e.g., by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—*a third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examina-

> tion, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry—there are no likely benefits to offset the threat to competition. (emphasis added)

Detroit Auto Dealers, 111 FTC 417 (1989), quoted in Areeda, *op cit* at 1127. Cf., *Massachusetts Bd. of Registration in Optometry*, 5 Trade Reg.Rep. ¶ 22,553 (FTC 1988).

This Court has been following a similar approach for several years. Areeda uses the example of *NCAA v. Board of Regents of Univ. of Oklahoma,* 468 U.S. 85 (1984), stating: "[w]hat makes the case interesting is that the Court simultaneously used words from both rule-of-reason and per se ideas, applying the rule of reason in the manner" illustrated above. Areeda devotes several pages to a detailed explanation of the converged per se/ rule of reason analysis as it was employed in *NCAA*. Areeda, *op cit.*, Vol. VII, ¶ 1511 at 430-436. Areeda concludes: "Although [this Court] certainly did not abolish the reasonableness-per se distinction, the Court made it clear that the distinction was more a spectrum than a sharp dichotomy." *Id.* at 436.

In the case which is the subject of this petition, the court of appeals overlooked the convergence of these theories, refusing to consider the market division issue because it was not separately pled as a *per se* violation at the trial level. In this respect, the court of appeals fell into the classic trap, described by Areeda as follows:

> "[J]udges and litigants too often assume erroneously that the classification, per se or rule-of-reason, necessarily determines what must or may be alleged and proved, made the subject of detailed findings, or submitted to the jury. The dichotomy is often misleading."

Id. at 428. A discussion of the conflict between the court of appeals approach and the decisions of this Court is

contained in Appendix D, pp. 63a-67a, under the heading:

> This panel's implicit determination that *"per se"* and "rule of reason" are separate legal theories under Sherman Act Section 1 contradicts the holdings of the United States Supreme Court in *FTC v. Indiana Federation of Dentists,* 476 U.S. 447 (1986) and *NCAA v. Board of Regents of Univ. of Oklahoma,* 468 U.S. 85 (1984).

CONCLUSION

A summary reconsideration is all that is necessary to dispose of this petition. This Court can grant the petition, vacate the judgment of the court of appeals, and remand the action to the court of appeals with instructions to determine the legality of the Korean market division arrangement under Section 1 of the Sherman Act.

If this Court wishes, instead, to consider the merits of the claim at this stage, it is not precluded from doing so by the fact that the court of appeals did not examine the merits.

The substantive and procedural issues raised by this petition are important, and they deserve the attention of this Court.

Respectfully submitted,

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